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ADJUSTMENT ASSISTANCE: A NEW PROPOSAL FOR ELIGIBILITY

In order to counter possible injury to domestic industry caused by tariff concessions, a program of adjustment assistance¹ was formulated as part of the Trade Expansion Act of 1962.² This program offered an alternative to the more drastic "escape clause"³ provisions for revoking tariff concessions. Adjustment assistance was designed to mitigate the dislocating effects of increased imports by providing the injured firm with financial,⁴ tax,⁵ and technical⁶ assistance to enable it to adjust to foreign competition,⁷ hopefully by a reallocation of resources to an industry in which it would have a comparative advantage⁸ over

¹ Adjustment assistance is a program designed to mitigate the effects of increased competition from imports brought about by tariff concessions. Tariff concessions promote free trade but can be injurious to the domestic producers of competing products. By aiding injured firms and their unemployed workers in readjusting to the new competitive situation, adjustment assistance can help the advance toward free trade. See Note, *Adjustment Assistance Under the Trade Expansion Act of 1962: A Will-O'-the-Wisp*, 33 GEO. WASH. L. REV. 1088, 1088-89 (1965).

² Title III of the Trade Expansion Act of 1962 (TEA) §§ 301-61, 19 U.S.C. §§ 1901-91 (1964).

³ The first "escape clause" enactment, passed as part of the Trade Agreements Extension Act of 1951, empowered the Tariff Commission to conduct investigations on the application of any interested party to determine whether, as a result in whole or in part of trade concessions, a product was being imported "in such increased quantities . . . as to cause or threaten serious injury to the domestic industry . . ." Trade Agreements Extension Act of 1951, ch. 141, § 7(a), 65 Stat. 74. If the Commission felt the statutory criteria were met, it recommended to the President that the United States in effect "escape" from its prior trade concession by increasing the tariff or instituting a quota to alleviate the injury.

The "escape clause" was retained in modified form in the Trade Expansion Act of 1962. Under the TEA a petitioning industry must sustain the burden of proving that the increased imports were caused in major part by tariff concessions and that they were the major factor in causing serious injury to the industry. TEA §§ 301(b)(1), (3), 19 U.S.C. §§ 1901(b)(1), (3) (1964).

⁴ TEA §§ 314-16, 19 U.S.C. §§ 1914-16 (1964).

⁵ *Id.* § 317, 19 U.S.C. § 1917.

⁶ *Id.* § 313, 19 U.S.C. § 1913.

⁷ Secretary of Commerce Hodges, in his testimony before the House Ways and Means Committee, said:

As the President stated in his message, "the accent is on *adjustment*," not on assistance. Firms will have to come up with reasonable development plans before they can qualify for loans under the program. And workers will have to be willing to try new jobs, or perhaps even move to new homes.

Hearings on H.R. 9900 Before the House Comm. on Ways & Means, 87th Cong., 2d Sess., pt. 6, at 3779-80 (1962) (emphasis in original).

⁸ Samuelson explains the principle of comparative advantage as follows:

Whether or not one of two regions is absolutely more efficient in the production

imported products. In addition, adjustment assistance was to be available for workers who had lost their jobs due to the effects of foreign competition on their employers.⁹

The Tariff Commission's original implementation of the program, however, failed to alleviate the effects of dislocation. Recent efforts to revitalize adjustment assistance have undermined the previous justification for the program in favor of easily implemented formulations. A new approach to adjustment assistance is needed—one that is not only workable, but also justifiable.

I

THE POLICIES BEHIND ADJUSTMENT ASSISTANCE

Three major policies underlie the program of adjustment assistance. First, it was realized that escape clause relief inhibited United States free trade policy.¹⁰ Second, escape clause relief protected an entire industry, even though only some of the firms in the industry were injured. It also hurt the consumer, who was forced to pay higher prices because less expensive foreign goods were kept out.¹¹ Adjustment assistance offered the advantage of allowing the benefits of free trade to inure to the consumer, while helping those injured by such imports to reallocate their resources to areas in which they could compete. Finally, since the government was responsible for negotiating tariff reductions, it had some obligation to assist firms and workers harmed by such reductions.¹²

of every good than is the other, if each specializes in the products in which it has a *comparative advantage* (greatest *relative* efficiency), trade will be mutually profitable to both regions. Real wages of productive factors will rise in both places.

P. SAMUELSON, *ECONOMICS* 651 (7th ed. 1967) (emphasis in original).

⁹ Such workers may be eligible for special trade readjustment allowances and retraining programs. TEA §§ 321-38, 19 U.S.C. §§ 1931-78 (1964). A worker's petition for eligibility to apply for adjustment assistance may be filed pursuant to *id.* § 301(c)(2), 19 U.S.C. § 1901(c)(2).

¹⁰ As trade policy became more and more intermingled with foreign policy, tariff adjustment became an inappropriate means of protecting domestic industry. The possibility that a negotiated trade concession might be negated—in whole or part—by a Presidential proclamation limited the authority of the tariff negotiators.

Comment, "In Major Part"—*The New Causation Problem in the Trade-Agreements Program*, 44 TEXAS L. REV. 1331, 1332 (1966).

¹¹ See the President's message transmitting the Administration's trade bill, in H.R. Doc. No. 314, in 2 U.S.C.C. & A.N., 87th Cong., 2d Sess. 4089 (1962).

¹² *Id.* at 4092.

II

INTERPRETATION OF THE STATUTORY CRITERIA

For a firm¹³ to be eligible for adjustment assistance it must show that: (1) imports are increasing;¹⁴ (2) the increase in imports results in major part from concessions granted under trade agreements;¹⁵ (3) the firm is seriously injured or threatened with serious injury;¹⁶ and (4) increased imports have been the major factor in causing or threatening to cause such injury.¹⁷ From the enactment of the Trade Expansion Act in 1962 until November 1969, no petition for adjustment assistance succeeded.¹⁸ The hurdles presented by these criteria became impossible to overcome because of the strict interpretation the Tariff Commission gave to the term "major." In deciding if increased imports had been a result "in major part" of trade concessions, the Commission tried to determine whether trade concessions accounted for the increase in imports more than all other causes combined.¹⁹ In addition, the Commission did not take an aggregate view of trade concessions.²⁰ Rather, it looked for the immediate impact of a concession on imports; if no such impact was observed soon after the concession had been granted, it was assumed that the lower tariff had become a condition of trade and could no longer be termed a cause

¹³ The same statutory criteria apply to an industry seeking tariff relief (TEA §§ 301(a)(1), (b)(1)-(3), 19 U.S.C. §§ 1901(a)(1), (b)(1)-(3) (1964)) and to workers seeking adjustment assistance. *Id.* §§ 301(c)(2)-(3), 19 U.S.C. §§ 1901(c)(2)-(3).

¹⁴ *Id.* § 301(c)(1), 19 U.S.C. § 1901(c)(1).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* § 301(c)(3), 19 U.S.C. § 1901(c)(3).

¹⁸ "[N]ever in thirteen industry investigations, seven firm investigations, nor six worker investigations had the Commission made an affirmative determination of eligibility for tariff adjustment or adjustment assistance . . ." Transmission Towers & Parts, TEA-W-9 & 10, Tariff Comm'n Pub. No. 298, at 15 (Nov. 3, 1969) (dissenting opinion).

¹⁹ National Tile & Mfg. Co., TEA-F-5, Tariff Comm'n Pub. No. 145, at 11-12 (Dec. 21, 1964).

²⁰ In Softwood Lumber, TEA-I-4, Tariff Comm'n Pub. No. 79 (Feb. 14, 1963), the Commission observed that "maximum stimulation of imports attributable to a reduction in duty generally occurs directly or shortly after the reduced rates come into effect." *Id.* at 10. See Umbrellas & Parts of Umbrellas, TEA-I-6, Tariff Comm'n Pub. No. 136, at 4 (Sept. 1, 1964).

The Commission may have been acting in a logical manner, but apparently in disregard of the legislative intent:

The phrase "as a result of concessions granted under trade agreements", as applied to concessions involving reductions in duty, means the aggregate reduction which has been arrived at by means of a trade agreement or trade agreements . . .

H.R. REP. No. 1818, 87th Cong., 2d Sess. 46 (1962); see S. REP. No. 2059, 87th Cong., 2d Sess. 20 (1962).

of increased imports.²¹ The Commission also tended to discount the relevance of tariff concessions negotiated before a petitioning firm was in operation,²² further limiting the likelihood of a successful showing that increased imports had resulted "in major part" from tariff concessions.²³

Similar obstacles were presented by the Commission's approach to determining whether increased imports were the "major factor" in causing or threatening to cause serious injury. The Commission claimed that if the sum of all causes other than increased imports was the dominant cause of the injury, the petitioner had not met the statutory test.²⁴ It also rejected the notion that the "major factor" test had been met when the increase in imports was the single most important influence.²⁵

III

REVISED STANDARDS FOR GRANTING ADJUSTMENT ASSISTANCE

After seven years without an affirmative determination of eligibility for adjustment assistance, the Commission recently modified its causation analysis and found the statutory criteria satisfied in the *Buttweld Pipe* and *Transmission Towers* cases.²⁶ In order to find injury, a majority of the Commission found the "in major part" and "major factor" standards were satisfied by a "but for" test.

This interpretation of "major," originally rejected by the Commission, had been foreshadowed in the concurring opinion of Commissioners Clubb and Thunberg in the *Eyeglass Frames*²⁷ case, and in the dissenting opinion of Commissioner Clubb in the *Barbers' Chairs*²⁸ case. In the latter, Clubb argued that the term "major" could be given three interpretations; it could be defined as "larger than all

21 *Barbers' Chairs*, TEA-F-7, Tariff Comm'n Pub. No. 229, at 7-9 (Jan. 22, 1968); *Softwood Lumber*, TEA-I-4, Tariff Comm'n Pub. No. 79, at 10 (Feb. 14, 1963).

22 See, e.g., *Industrial Biochemicals, Inc.*, TEA-F-2, Tariff Comm'n Pub. No. 101, at 2-3 (July 23, 1963).

23 See *Buttweld Pipe*, TEA-W-8, Tariff Comm'n Pub. No. 297, at 18 (Nov. 3, 1969) (dissenting opinion).

24 The Commission stated that the "major factor" is "not only . . . the one exerting the greatest influence but also the one that dominates the overall result." *National Tile & Mfg. Co.*, TEA-F-5, Tariff Comm'n Pub. No. 145, at 7 (Dec. 21, 1964).

25 *Id.*

26 *Transmission Towers & Parts*, TEA-W-9 & 10, Tariff Comm'n Pub. No. 298 (Nov. 3, 1969); *Buttweld Pipe*, TEA-W-8, Tariff Comm'n Pub. No. 297 (Nov. 3, 1969).

27 TEA-I-10, Tariff Comm'n Pub. No. 219, at 14-16 (Oct. 6, 1967).

28 TEA-F-7, Tariff Comm'n Pub. No. 229, at 32-38 (Jan. 22, 1968).

other [factors] combined," as "the largest single cause," or as any "substantial" factor. Clubb argued that "major" must be defined as meaning "substantial" because it was the only definition that would give workable results.²⁹ Thus, if trade concessions were a "substantial" cause of increased imports and the imports were a "substantial" cause of injury, the "major part" and "major factor" tests would be satisfied. Later in the dissent he noted that a factor or cause would be substantial if "but for" it the result would have been contrary.³⁰

By implementing the "substantial" standard with a "but for" test, a majority of the Commission found the petitioning parties eligible for adjustment assistance in *Buttweld Pipe* and *Transmission Towers*.³¹ The Commission found that there had been an increase in imports and went on to consider whether the increase had resulted "in major part" from trade concessions; it asked, "but for the concessions, would imports be substantially at their present level,"³² and determined that the revised criteria had been met.

The "but for" test is a significant departure from the dominant factor approach employed in the earlier Commission decisions. Under this analysis, an increase in imports can be found to result "in major part" from concessions whenever the concessions are, in effect, no more than the "straw that breaks the camel's back";³³ any necessary cause may be termed a "major" one, even if it is only one of several minor causes. Thus, the "major part" test has been distorted by the Commission in an effort to reach a workable formula.³⁴

²⁹ He rejected the definition of "major" as "larger than all [other factors] combined" because it made the adjustment assistance program unworkable. Similarly, he rejected defining "major" as "the largest single cause" because such a standard was neither practical nor predictable; there was no realistic way of deciding whether certain factors constituted an aggregate cause or were merely separate causes. Clubb said:

[D]etermining whether a group of factors should be lumped together as one cause which is 50% responsible for increased imports, or whether they should be split up into five separate causes, each 10% responsible, is a process which cannot be done on any but a capricious and whimsical basis. It seems unlikely that Congress would make the right to relief depend upon such metaphysical nonsense. . . . Accordingly, it seems clear that the "largest single cause" interpretation should be ruled out because it is not practical.

Id. at 34 (footnote omitted).

³⁰ *Id.* at 38.

³¹ Note 26 *supra*.

³² *Buttweld Pipe*, TEA-W-8, Tariff Comm'n Pub. No. 297, at 10 (Nov. 3, 1969).

³³ National Tile & Mfg. Co., TEA-F-5, Tariff Comm'n Pub. No. 145, at 8 n.1 (Dec. 21, 1964).

³⁴ In a given case, the dominant cause of increased imports might be the poor quality or design of the domestic product, or high monopolistic prices charged by the domestic firm. Under the "but for" test, however, increased imports could be found to be the result "in major part" of tariff concessions if such concessions had contributed in some degree to the increase in imports.

The Commission has also shifted its view as to what trade concessions will be considered causes of increased imports.³⁵ The present majority of the Commission holds that in determining whether increased imports have been caused "in major part" by trade concessions, the term "concessions granted under trade agreements"³⁶ means the aggregate of all concessions that have been granted.³⁷ The Commission considers the cumulative total of reductions made for the product in question and determines whether the total reduction is a substantial part of the price differential between the lower priced import and the higher priced domestic product.³⁸ This new interpretation facilitates a finding that increased imports have been the result "in major part" of tariff concessions.

The Commission also employs the "but for" test in determining whether the increased imports have been the "major factor" in causing or threatening to cause serious injury to the firm or the unemployment of workers.³⁹ In the recent cases in which the Commission has used the "but for" test, it has glossed over the "major factor" question, making the perfunctory statement that the injury would not have occurred "but for" the increased imports.⁴⁰ If there is a showing of increased imports caused "in major part" by tariff concessions, and injury is established, the "major factor" requirement would seem to present little difficulty in proving eligibility for adjustment assistance.

IV

TOWARDS A NEW POLICY FOR ADJUSTMENT ASSISTANCE

Although the new tests applied by the Commission yielded affirmative findings on petitions for adjustment assistance, the revised interpre-

³⁵ See text at notes 19-20 *supra*.

³⁶ TEA § 301(c)(1), 19 U.S.C. § 1901(c)(1) (1964).

³⁷ See H.R. REP. NO. 1818, *supra* note 20, at 46; S. REP. NO. 2059, *supra* note 20, at 20.

The tariff concessions to be taken into account are those which have been arrived at by means of trade agreements entered into pursuant to the TEA § 201, 19 U.S.C. § 1821 (1964), or the Tariff Act of 1930, § 350, 19 U.S.C. § 1351 (1964). H.R. REP. NO. 1818, *supra* note 20, at 46; S. REP. NO. 2059, *supra* note 20, at 20.

³⁸ For example, in the *Buttweld Pipe* case, the aggregate of tariff concessions totalled 9%, and imported pipe was selling for between 11% and 15% less than domestically produced pipe. Thus, the majority of the Commission believed that "except for the concessions, imports could not have reached substantially the level they have and, therefore, within the meaning of the Trade Expansion Act of 1962 the increased imports are a result in major part of the tariff concessions." Tariff Comm'n Pub. No. 297, at 11. That the last significant concession was granted before 1948 and that the mill was not constructed until the early 1960's were not considered relevant.

³⁹ See, e.g., *Transmission Towers & Parts*, TEA-W-9 & 10, Tariff Comm'n Pub. No. 298, at 13 (Nov. 3, 1969); *Buttweld Pipe*, TEA-W-8, Tariff Comm'n Pub. No. 297, at 12 (Nov. 3, 1969).

⁴⁰ Cases cited in note 39 *supra*.

tations of "in major part" and "major factor" run counter to the aims of the adjustment assistance program. Assistance may now be granted whether or not tariff concessions and foreign competition are the real causes of domestic injury. The argument that adjustment assistance is an indefensible preference to firms and workers that happen to have some relationship to foreign competition is again valid.⁴¹

A. *Adjustment Assistance and the Proposed Trade Act of 1969*

In an effort to solve the problems in the adjustment assistance program formulated under the Trade Expansion Act of 1962, President Nixon in his proposed Trade Act of 1969 has offered new standards for determining eligibility for adjustment assistance.⁴² This bill was formulated prior to the Commission's affirmative findings of eligibility under the 1962 Act and was meant to remedy the strict interpretations of "in major part" and "major factor" then employed by the Tariff Commission.⁴³

The proposal attempts to promote a trend towards adjustment assistance by making the statutory test for adjustment assistance easier to meet than the corresponding test for escape clause relief. It would grant adjustment assistance when increased imports are found to be "a substantial cause of serious injury, or the threat thereof,"⁴⁴ and grant tariff relief only when increased imports are "the primary cause of serious injury, or the threat thereof."⁴⁵ It eliminates the requirement that the increased imports must be caused "in major part" by tariff concessions. Tariff relief or adjustment assistance could therefore be granted no matter what the cause of the increased imports.

By doing away with the causal relationship between tariff concessions and increased imports, the Nixon bill negates one of the underlying policy reasons for the adjustment assistance program.⁴⁶ When the

⁴¹ See, e.g., 2 U.S.C.C. & A.N., 87th Cong., 2d Sess. 3143-44 (1962).

⁴² President Nixon's proposals concerning modification of the adjustment assistance program are contained in H.R. 14870, 91st Cong., 1st Sess. (1969), and are based on a report to the President entitled FUTURE UNITED STATES FOREIGN POLICY, by William Roth, the then Special Representative for Trade Negotiations. The report was transmitted to the President on January 14, 1969, before the Tariff Commission had found any petitioners eligible for adjustment assistance.

⁴³ President Nixon, in a speech outlining the adjustment assistance proposal, said that the present system "ha[s] not worked adequately." 115 CONG. REC. H 10979 (daily ed. Nov. 18, 1969).

⁴⁴ H.R. 14870, 91st Cong., 1st Sess. § 301(f) (1969).

⁴⁵ *Id.* § 301(d).

⁴⁶ The bill also changes the roles of the Commission as fact finder and decision maker. Under the present statute, the Tariff Commission performs these roles in both tariff relief and adjustment assistance petitions. Under the Nixon proposal, the Commission would continue to gather and supply the needed factual information in petitions for either tariff relief or adjustment assistance, but determinations of eligibility to apply for

present adjustment assistance law was passed, it was believed that aid to injured firms and workers could be justified because it would only be given when the injury caused by increased foreign competition was brought about by direct government action in reducing tariffs.⁴⁷ If the causal requirement is eliminated, this policy basis is no longer present, and a new governmental policy must be defined.

Absent a showing that tariff concessions caused the increased imports, the only policy justification for adjustment assistance under the Nixon proposal is that the government has an obligation to aid any party injured by imports. Consequently, the other policy reasons behind adjustment assistance—that it is a method of aiding injured parties without hurting the United States policy of fostering freer trade, and that it offers a more precise method of aid than escape clause relief—must be reconsidered.

Adjustment assistance should be given more easily than tariff relief because the former has virtually no adverse effect on overall United States foreign trade policy, but such aid should only be given when it enhances foreign trade policy. Granting adjustment assistance any time a petitioning party is injured by imports gives an unwarranted preference to such parties, for it discriminates against like firms that happen to be injured by domestic, rather than foreign, competition.⁴⁸

The only defensible policy foundation for adjustment assistance when no causal connection between increased imports and tariff con-

adjustment assistance would be made by the President, with the Commission continuing to decide questions of tariff relief. *See id.* § 301(b).

There is an inherent inconsistency in the Nixon formulation. The Commission would be applying the "primary cause" test for tariff relief, and the President (or a board to which he delegated his authority) would be applying the less strict "substantial factor" test. In applying these tests each board might develop its own method of analysis for making determinations, and an application that is denied eligibility for adjustment assistance could be granted tariff relief under the supposedly stricter "primary cause" test due to inconsistent standards. (It should be noted that, if the Commission makes a positive determination for tariff relief, the President may furnish such relief or provide that the firms and workers in the industry may apply for adjustment assistance.)

⁴⁷ *Hearings on H.R. 1170 Before the Senate Comm. on Finance*, 87th Cong., 2d Sess., pt. 4, at 1718 (1962).

⁴⁸ The past Chairman of the Tariff Commission, Stanley Metzger, believes that special preferences for industries and firms injured by imports are justified regardless of the policy behind the aid. He argues:

Special adjustment assistance, while creating a differential in favor of import-displaced workers . . . may serve the purpose in time of raising the levels of adjustment assistance available generally, through higher benefits in state unemployment compensation systems and in federal programs . . . perhaps just in order to eliminate the favoritism evidenced by such special assistance to import-displaced workers!

S. METZGER, *TRADE AGREEMENTS AND THE KENNEDY ROUND* 56 (1964).

cessions is required would rest directly on economic grounds. In terms of international free trade theory, it makes better economic sense to help firms adjust to imports by reallocating their resources to areas in which they have a comparative advantage over imported goods than to raise tariffs to keep out low-priced foreign goods.

B. *An Alternative Proposal*

It is reasonable to grant adjustment assistance when concessions have caused the injury, for then there is a compensating justification for giving aid. Under such a program, aid would not be given if it were, for example, shoddy domestic workmanship or poor domestic sales strategy that caused imports to increase.⁴⁹ Thus, the present system is grounded on a logical policy basis. However, it has been difficult to establish the necessary causal relationship between increased imports and tariff concessions. Resort to a "but for" test has demonstrated that in order to obtain workable results from the present statutory formulation the underlying policy of the adjustment assistance program must be distorted. The Nixon proposal offers only a partial solution to the problem; it provides a manageable standard, but one devoid of a justifiable policy basis. It would apparently grant aid to any firm or group of workers injured by increased imports, regardless of the cause of the increase.

It may be that under the Nixon proposal adjustment assistance would not be given to undeserving firms and would only be granted if the domestic firm were at a comparative disadvantage vis-à-vis imported goods. This result, which would logically fall within a policy of promoting freer trade, could be achieved under the Nixon proposal by a finding that increased imports are not a substantial factor in causing injury if other factors are more substantial. However, such an interpretation would, in effect, make the "substantial cause" test a "primary cause" test, which does not appear to be the proposal's intent.⁵⁰ In light of the Commission's recent decision that the term "major" in the 1962 Act means "substantial" and its use of the "but for" test to find a "substantial" cause, a construction of the Nixon proposal to deny adjustment assistance in a case where there is no comparative disadvantage seems even less probable.

⁴⁹ The increased imports would not have been the result in major part of the trade concessions, but of the domestic problems of the firm. *See, e.g.,* Barbers' Chairs, TEA-F-7, Tariff Comm'n Pub. No. 229, at 4-6 (Jan. 22, 1968); *cf.* Ice Skates & Parts Thereof, TEA-I-9, Tariff Comm'n Pub. No. 149, at 4 (Feb. 19, 1965).

⁵⁰ The Nixon proposal reserves the "primary cause" test for determining eligibility for tariff relief. H.R. 14870, 91st Cong., 1st Sess. § 301(d) (1969).

A workable standard can be based on the policy of aiding free trade by reallocating the resources of firms at a comparative disadvantage with foreign competition. It might be attained by a provision that adjustment assistance be granted only when increased imports are found to be "a substantial cause of serious injury, or the threat thereof,"⁵¹ *and the injured firm does not have the potential to effectively compete with such imports*. Such a formulation would grant adjustment assistance⁵² solely to firms and workers injured by an international phenomenon—comparative disadvantage vis-à-vis foreign competitors.⁵³ In cases where the firm has the potential to successfully compete because the foreign producer has no comparative advantage, there is little purpose in granting aid; the injured firm is no different from one injured by *domestic* competition.

This standard would have the advantage of not being tied to a

⁵¹ *Id.* § 301(f).

⁵² The same standard would be used for granting tariff relief, except the term "substantial" would be replaced by "primary." This proposed modification of the Nixon formula could be used in determinations of petitions for tariff relief as well as adjustment assistance, to ensure that adjustment assistance would be more freely granted than tariff relief. That result would be assured because the only difference between the two tests would be the use of the more rigorous term "primary" in the tariff relief standard.

⁵³ Under this proposal the Tariff Commission would first make a determination of whether there was actual or potential serious injury to the petitioning firm or group of workers. If the necessary injury had occurred, the Commission would next examine the question of whether increased imports were a "substantial" cause of actual or potential serious injury. The Commission might follow its recent interpretation and employ the "but for" test in making the determination. This would not undermine the policy behind the proposal because the petitioner would still have to overcome the comparative advantage test, which would ensure that the underlying policy of the adjustment assistance program was followed. If "substantial" cause were found, the Commission would determine whether the injured firm had the potential to effectively compete with such imports. If it did not, the firm would be eligible to apply for adjustment assistance. The Tariff Commission should not find this determination difficult to make because it has already followed the practice of investigating the status of domestic producers. *See, e.g.,* Transmission Towers & Parts, TEA-W-9 & 10, Tariff Comm'n Pub. No. 298, at 37 (Nov. 3, 1969).

Under this proposal the Commission would compare the economic condition of the firm with that of its domestic competitors of comparable size and product range. If the Commission found the rest of the industry to be operating at an acceptable profit level, there would be a rebuttable presumption that the petitioner did have the potential to compete, in that it was not being injured by foreign firms with a comparative advantage. It would then be up to the firm to rebut the presumption, by proving that it did not have the potential to effectively compete with its foreign competitors because it was at a comparative disadvantage. If a substantial part of the industry were not operating at an acceptable profit level, the presumption would be in the petitioner's favor. The Commission would then investigate the foreign industry to determine whether or not there were significant differences between domestic and foreign costs of production. The Commission has made similar investigations under 19 U.S.C. § 1336 (1964). The relevant factors in such an investigation are outlined in 19 C.F.R. §§ 202.2(c), 202.5 (1970).

determination of whether trade concessions caused the increased imports, and would more directly relate the adjustment assistance program to the theory of reallocating the resources of firms at a comparative disadvantage. By requiring a determination that the firm is at a comparative disadvantage, the problems of implementing the "substantial cause" test through a "but for" formulation would be avoided. In addition, since the proposed formulation is based on the economic concept of granting adjustment assistance to firms injured through their inability to compete successfully with foreign industries, it does not suffer from the defect of the Nixon proposal—aiding *any* firm injured by increased imports.

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